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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 902

PAUL GINSBURG, Petitioner

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Second Circuit to review its judgment dated and entered January 28, 1959 (App. 1); and the Order denying Petition for Rehearing (R. 41a) dated and entered February 19, 1959.

OPINIONS BELOW

The Order of the United States District Court for the Southern District of New York, which was the subject of the appeal, was not accompanied by an Opinion. However, after the expiration of the time for filing Notice of Appeal, there was filed in the District Court a

"Memorandum of Bicks, D. J.", which is reported in 170 F. Supp. 212. The Opinion of the United States Court of Appeals for the Second Circuit is reported in 263 F. 2d 608, and is appended hereto (App. 1).

JURISDICTION

The judgment sought to be reviewed (App. 1) was dated and entered January 28, 1959.

The Order of the Court of Appeals denying the Petition for Rehearing (R. 41a) was dated and entered February 19, 1959. Therefore, the time for filing this petition for writ of certiorari expires May 20, 1959.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. When the defendant has already failed to plead or otherwise defend the action, and thus waived the right to do so, pursuant to the Federal Rules of Civil Procedure; does a District Court Judge have the right to grant the defendant an affirmative defense *nunc pro tunc* applied for in a way not provided for by the Rules? And is not the sanctioning by the Court of Appeals of such a departure from the accepted and usual course of judicial proceedings, grounds for a writ of certiorari?

2. When there is no genuine issue as to any material fact, the defendant already being in default of pleading or otherwise defending the Complaint and having waived the right to do so pursuant to the Federal Rules of Civil Procedure, must not summary judgment be entered for the plaintiff as a matter of law under Rule 56?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution of the United States involved herein is the Fifth Amendment, the pertinent portion of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172) is as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law: . . ."

STATEMENT OF THE CASE

The petitioner, Paul Ginsburg, is a practicing lawyer of Pittsburgh, Pennsylvania; a member in good standing of the Bar of State and Federal Courts in Pennsylvania and of this Honorable Court; and a member in good standing of The Allegheny County Bar Association (and past officer thereof), the Pennsylvania State and American Bar Associations.

The respondent, The Mutual Life Insurance Company of New York, is a New York corporation engaged, *inter alia,* in the business of selling policies of life insurance.

Petitioner's complaint (R. 4a-6a) with jurisdiction based upon diversity of citizenship and a sum in excess of $27,000.00 exclusive of interest and costs was brought on May 11, 1953, to secure the proceeds of policies of insurance issued by the respondent on the life of plaintiff's brother, Samuel A. Ginsburg, who died on April 7, 1953, of which policies the plaintiff is the sole beneficiary and absolute owner. The respondent as the defendant in the District Court failed to appear and plead or otherwise defend this action pursuant to the Federal

Rules of Civil Procedure. After the expiration of the time within which defendant could plead or otherwise defend the action, it mailed to the Clerk of the district court for filing on July 1, 1953, and on September 21, 1953, affidavits of Arthur Kaiser exhibiting unauthenticated restraining orders supposedly entered in the District Court for the Western District of Pennsylvania in Civil Action No. 11521 which purported to enjoin plaintiff from prosecuting this action. On December 4, 1957, with full knowledge of the entire file, as aforesaid, District Judge Alexander Bicks entered an Order to File Note of Issue in 120 Days (R. 7a) under penalty of dismissal for want of prosecution. Pursuant to said Order which was filed on December 6, 1957, the defendant was served with plaintiff's Note of Issue (R. 8a) and Statement Pursuant to Calendar Rule 5, which the defendant did not oppose. Accordingly, the case was assigned No. 105 on Jury Calendar 2.

In that state of the record the plaintiff moved the Court to enter summary judgment against the defendant in the sum of $27,456.38, the principal amount sued for, together with interest thereon from April 7, 1953, at the rate of 6% and the costs and disbursements of this proceeding (R. 9a) pursuant to Rule 56. After the plaintiff's Motion for Summary Judgment was filed May 6, 1958, returnable May 15, 1958, the defendant through Attorney Haughton Bell served a Notice of Special Appearance and a Cross-Motion for Order Directing That Injunction of Another United States District Court Be Made the Order of This Court and That this Action Should Not Be Placed on Any Trial or Assignment Calendar (R. 10a-11a), although there is no provision for a special appearance or such a cross-motion under

the Rules. Apparently the defendant belatedly was trying to assert an affirmative defense which is waived pursuant to Rule 12(h) unless pleaded pursuant to Rule 8(c).

In the District Court, petitioner's affidavit in support of Motion for Summary Judgment shows that the alleged restraining order entered in the Pennsylvania District has long since its entry become ineffective and unenforceable; that the alleged order was entered in an interpleader proceeding which was fraudulently instituted by reason of misrepresentations that there was another adverse claim against the defendant; that the other "claim" was adverse to the plaintiff only as it claimed that the proceeds of the policies should be *paid to plaintiff* as trustee instead of individually; that the said interpleader action, together with the interpleaded fund, was illegally transferred on May 29, 1957, from the Pennsylvania District to the Arizona District where it is still pending and undetermined; that on February 13, 1958, at the instance of The Mutual Life Insurance Company of New York an Order was entered in the Pennsylvania District, upheld by the Court of Appeals for the Third Circuit at No. 12551 on February 20, 1958, that the Pennsylvania District is without jurisdiction and any relief must be pursued in the Arizona District. Therefore, it was plaintiff's position below that it had become inconsistent, improper and unlawful for the defendant herein to maintain that said ineffective and unenforceable restraining order should continue to hinder, and frustrate the instant action unduly. Furthermore, the defendant did not seek injunctive relief in the Arizona District after transfer of the cause; nor has it sought such relief in the New York District pursuant to

the Federal Rules of Civil Procedure, and is foreclosed from doing so. Accordingly, it was plaintiff's final proposition that assuming *arguendo* the alleged restraining order to be valid and subsisting in the Pennsylvania District and the Arizona District, nevertheless it cannot be recognized, considered and effectuated in the New York District because defendant has done nothing to entitle it thereto under the Rules, which the Court is powerless to waive. As a matter of fact and of law, the lower court was powerless even to take Judicial Notice of the alleged unauthenticated restraining order.

In the face of the record and the fully supported motion for summary judgment, and inconsistently with its failure to oppose plaintiff's Note of Issue, the defendant served its "special appearance" and "cross-motion" (10a-11a). Unrealistically, the three averments of the cross-motion (10a) seek the impossible. Averment 1 admits that the alleged restraining order of the Pennsylvania District has not been made an order of the court below, and said court is not bound thereby; that the defendant is in default; that the plaintiff is entitled to summary judgment; and, in effect, that the defendant seeks the special privilege of not being bound by the Federal Rules of Civil Procedure and the applicable law. Averment 2 moves the Court to overlook the then existing listing of the case on the jury calendar as though the calendar were never published, by ordering the Clerk and Calendar Commissioner not to list it. Averment 3 is a typical prayer normally concluding a properly drawn equity action for an injunction, the main apparent defect being that it is not preceded by an apparent complaint. The affidavit attached thereto does not contain any factual or legal opposition to plaintiff's motion for summary

judgment, and could not possibly justify the insupportable and untenable cross-motion which it presumes to support. The said cross-motion constitutes a misrepresentation to the Court that the alleged unauthenticated restraining order of the Pennsylvania District is a valid and subsisting injuction which should be recognized, considered and effectuated in the New York District in violation of the Federal Rules of Civil Procedure and the applicable law.

On May 15, 1958, the action was before District Judge Alexander Bicks on plaintiff's Motion for Summary Judgment pursuant to Rule 56, and defendant's cross-motion in violation of the Rules, at which time Judge Bicks admitted plaintiff to the Court specially for this case and granted plaintiff ten minutes for his presentation and ten minutes for rebuttal. Without reason, the plaintiff's argument from the start was incessantly interrupted and then abruptly terminated by Judge Bicks who actually denied plaintiff the right to be heard. Then Judge Bicks assumed the representation of the defendant by making arguments in its behalf *sua sponte,* and voluntarily offering counsel for the defendant (1) the grant of transfer of the cause to Arizona if he would present such a motion, (2) a donation of counsel fees if he would present such a motion, and (3) other relief to which defendant was not entitled. The embarrassed counsel for defendant refused to accept Judge Bicks' offerings of fees and transfer, but readily accepted the other relief, as evidenced in Judge Bicks' Order (12a-14a) entered June 27, 1958, which is the subject of the appeal. The said Order is inconsistent and in direct conflict with Judge Bicks' prior Order to File Note of Issue.

By the Order of June 27, 1958, the district court erroneously held that (1) plaintiff's Motion for Summary Judgment be denied; (2) the affidavits exhibiting the alleged unauthenticated restraining orders "be regarded as constituting defendant's answer timely filed to the complaint herein setting forth as defendant's defense to said complaint the facts contained in said affidavits"; (3) plaintiff "be and hereby is permanently enjoined and prohibited from prosecuting this action, or any other action for or on account of the amounts payable under or in any way connected with insurance policies #6149400 and #6149401 issued by the defendant other than the action in the United States District Court for the Western District of Pennsylvania (Civil Action #115.21)"; and (4) this action be marked "enjoined" in the Court's files and records of this action.

Because the said affidavits filed July 1, 1953, and September 21, 1953, for defendant in the District Court are not pleadings under the Rules, and otherwise were not procedurally or properly before the Court, your petitioner did not print them for use of the Court below, but the respondent did (R. 17a-23a). Furthermore, because the "Memorandum of Bicks, D. J." was not filed until after expiration of the time for filing Notice of Appeal, your petitioner did not print it for use of the court below, but the respondent did (R. 24a-27a).

Just as District Judge Alexander Bicks violated the Canons of Judicial Ethics in his mistreatment of your petitioner, and violated the Federal Rules of Civil Procedure in his mishandling of the cause of action, your petitioner and his cause were to meet the same fate on appeal with Hon. Harold R. Medina presiding. Circuit Judge Medina delimited unduly the time for oral argu-

ment by his asseveration that he had read the briefs and by his menacing demeanor that appellant had better hurry and leave, "or else—". Originally petitioner had been notified that the argument in the Court of Appeals would normally be had by the middle of November, 1958, but later petitioner was notified that it was set definitely for January 15, 1959, when Circuit Judge Medina was presiding. After the brush-off in open Court, and the one sentence opinion (App. 1) both insupportable and unsupported, your petitioner investigated and found that the jurist's son, Harold R. Medina, Jr., Esquire, has a law partner on the Board of Trustees of respondent, The Mutual Life Insurance Company of New York, the said law partner being Roswell Magill, Esquire, of Cravath, Swaine & Moore; and further that there is a definite connection between the clientele of Harold R. Medina, Jr., Esquire, and members of the Board of Trustees of The Mutual Life Insurance Company of New York. It is respectfully submitted that Circuit Judge Medina should have recused himself.

The appeal might just as well have been argued before District Judge Bicks.

The judgment sought to be reviewed based th affirmance on the opinion of Judge Bicks which is not even properly of record, because it was entered and filed after the appeal. The denied Petition for Rehearing shows that the Court of Appeals overlooked or misapprehended the entire appeal (mistakenly reviewing "an order of the District Court refusing to vacate a prior order . . .") (App. 1) as well as every one of appellant's points, all fully supported under the Federal Rules of Civil Procedure and the applicable law. In the

Order denying rehearing (R. 41a) the Court of Appeals backtracked, but not enough to do justice, stating, "The basis of our affirmance is the existence of a valid outstanding injunction restraining the further prosecution of this case by appellant. None of the technical arguments advanced by appellant furnish any ground for the disregard by us of this injunction." By what the Court failed to state, it has admitted that said "valid outstanding injunction" is not enforceable or even cognizable in the New York District; and the "arguments advanced by appellant" are the Law of the Land but are erroneously disregarded because "technical". The "opinion" (App. 1) of the Court of "Appeals", consisting of one sentence, is violative of Canons of Judicial Ethics requiring a discussion of the points and authorities of the unsuccessful as well as the successful party in order to keep the decision above suspicion. The denial of rehearing was in due course followed by denial of a Motion to Remand on March 24, 1959, which motion was wholly meritorious and showed why this Honorable Court will grant certiorari. On page 4 of the Motion to Remand (R. 48a) petitioner expressed the futile hope "that the consideration of this motion will not be influenced by the fact that a law partner of Harold R. Medina, Jr., Esquire, is on the Board of Trustees of The Mutual Life Insurance Company of New York. Said law partner is Roswell Magill, Esquire, of Cravath, Swaine & Moore". Typical of the treatment received below is the denial on April 3, 1959, of the Motion for Stay of Mandate (R. 54a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Judgment Sought To Be Reviewed Conflicts With the Law Of The Land.

A. *The Respondent Waived Its Right To Claim Injunctive Relief Below; Assuming Arguendo It Had The Right.*

When plaintiff's Motion for Summary Judgment had been served, the defendant was entirely in default of pleading or otherwise defending the action under the Federal Rules of Civil Procedure. Under Rule 7(a) defendant could have filed an Answer; and no other pleading shall be allowed. Rule 7(b) provides further (1) An application for an Order shall be by motion in writing, which shall state with particularity the grounds therefor and the relief or order sought; and (2) The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules. Rule 8 provides the General Rules of Pleading, and all affirmative defenses such as the injunctive relief sought herein must be pleaded specially under Rule 8(c). Under Rule 12(a), a defendant shall serve his answer within 20 days after the service of the summons and complaint. Under Rule 12(b) every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that certain defenses may at the option of the pleader be made by motion. Under Rule 12(h) a party waives all defenses and objections which he does not present either by motion as hereinabove provided or, if he has made no motion, in his answer or reply. The defendant herein did not comply with any of the foregoing Rules, ignor-

ing all of the applicable Rules. Certainly by its failure to plead for injunctive relief under Rule 8(c), it has waived that affirmative defense pursuant to Rule 12(h). The case of *Van Sant v. American Express Co.*, 169 F. 2d 355 (C. C. A. 3, 1948), is authority for the point that defenses by way of confession and avoidance must be pleaded under Rule 8(c), otherwise they are waived pursuant to Rule 12(h), and then are not allowable subsequently by amendment. In the case of *Rank, et al. v. United States, et al.*, 16 F. R. D. 310 (U. S. D. C., S. D. Cal., N. D.), the defendant United States of America failed to file a pleading or motion other than a motion to dismiss which had been overruled. Instead it had filed various documents entitled "Suggestions" under Rule 12(h)(2), raising the Court's lack of jurisdiction. The Court held (p. 313) even against the United States that "Obviously a 'Suggestion' made under Rule 12(h) is not a pleading, nor is it a motion under the Federal Rules of Civil Procedure. And, filing a 'Suggestion' does not relieve a party from pleading or moving the Court under the Federal Rules of Civil Procedure." Thereupon, the Court ordered (pp. 313-314) that the "Suggestions" be denied, overruled, rejected, stricken. Analogously, herein, the same disposition should be made of the affidavits of Arthur Kaiser upon which defendant herein relied.

In support of this point are the following additional authorities. Defendant waived the defense that petition did not state a claim upon which relief could be granted by failing to present that defense either by answer or motion as required by Rule 12(h). *Black v. Shondell*, 174 F. 2d 567 (C. C. A. 8, 1949). Lack of capacity to sue must be questioned by a motion prior to answer,

or in the answer itself, otherwise the objection is waived. *Coburn v. Coleman*, 75 F. Supp. 107 (1947) (D.C., W. D. S .C.). Where the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself, the defense is waived by Rule 12(h), not because of the defendant's voluntary appearance, but because of his failure to assert the defense within the time prescribed by this rule. *Ginn v. Biddle*, 60 F. Supp. 530 (1945 E. D. Pa.). Where it was stipulated that essential elements conferring general jurisdiction on District Court were present, and defendant corporation entered no plea or objection of improper venue, any right defendant corporation might have had to be sued in another district was waived. *Acadian Production Corp. v. Land*, 136 F. 2d 1 (C. C. A. 5, 1943).

Subdivision (h) of Rule 12 intends that any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been waived. *Phillips v. Baker*, 121 F. 2d 752 (C. C. A. 9, 1941), certiorari denied 314 U. S. 688. The authorities on this point are so numerous and uncontradictable that petitioner is justified in arguing that because nothing of record indicates that those herein representing The Mutual Life Insurance Company of New York are in need of protection by guardian because of mental or physical incompetence, minority or senility, or any other reason, District Judge Bicks was indiscreet to grant the defendant *nunc pro tunc* a non-existent (or even legal) defense not pleaded and therefore waived, to "protect" the defendant from its liabilities imposed by law.

B. *The Respondent Lacked A Right Because Of Its Own Wrong.*

The respondent's first wrong was perpetrated when it breached its contracts of insurance with petitioner, who was not only the sole beneficiary named therein but also the absolute owner thereof. After the decedent-insured's wife had unalterably decided to divorce him and after the decedent-insured had made a complete financial settlement accepted by his wife, then he transferred all rights in the policies to petitioner, his brother. The decedent-insured had the legal right to make the transfer for any reason or for no reason at all. Nevertheless, both before and after petitioner surrendered the policies for payment, respondent was dealing behind his back with decedent-insured's ex-wife and her divorce attorney, giving them confidential information relating to petitioner's contracts and encouraging them to bring suit framed on an oral trust created "at the time" of the transfer.

The respondent's next wrong was in interpleading the proceeds, because it was a patently fraudulent interpleader, and most damaging to petitioner. Like conspirators usually do, the respondent and its counsel and the ex-wife and her counsel made a mistake. Instead of deciding upon a different trustee for the "oral trust", they wanted to be "honest" about it and decided that your petitioner was the trustee and so alleged. As a result, all that respondent had to do to be relieved of all liability was to pay your petitioner individually and/or as trustee. But that would not stop a contract breaker like The Mutual Life Insurance Company of New York from interpleading under a statute that pro-

vides for it only when two or more adverse claims are made *against the insurer.*

A most reprehensible wrong on the part of respondent is its repeated attempts to exert undue influence to cause adverse decisions against your petitioner both in the Pennsylvania District and the Arizona District to which the cause was illegally transferred. It is elementary that *in rem* proceedings, such as an interpleader, are not subject to transfer under 28 U.S.C.A., sec. 1404(a), or otherwise. That is why District Judge Bicks, in assuming the representation of the defendant, could not find an interpleader action which stated the principle set forth in the Opinion he cited of Chief Judge L. Hand in the case *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 2 Cir., 1950, 178 F. 2d 866, holding that Orders of the Court are not vitiated by transfer. Even if Judge Bicks could have cited an interpleader action stating that same principle, it would not have supported his decision because on top of that insurmountable burden he would have had the impossible one of finding authority that defendant could obtain enforcement of such order in a foreign jurisdiction without complying with the Rules.

The other "authority" Judge Bicks located to "justify" his personal opinion was Rule 6(b)(2) authorizing enlargement of time to file, on motion, for excusable neglect. This Rule is not applicable herein, but even if it were, Judge Bicks overlooked or misapprehended the point in applying it that he would be enlarging the time for filing nullities.

In view of the above mentioned wrongs perpetrated by the respondent, it is barred from the relief donated

to it by Judge Bicks and sanctioned by Judge Medina on the principle that a party cannot be permitted to take advantage of its own wrong. *Stearns Co. v. United States*, 291 U. S. 54, 61-62 (1934); *Deitrick v. Greaney*, 309 U. S. 190, 196, rehearing den., 309 U. S. 697 (1940).

It is respectfully submitted that when the defendant's own wrong is at the bottom of its own default in an attempted defense of an action, it is reversible error for Judges to permit the defendant to take advantage of its own wrong, thus depriving the plaintiff of his right to the protection and enforcement of the Federal Rules of Civil Procedure.

C. *The Court below erred in refusing to be bound by the Federal Rules of Civil Procedure.*

This point is elementary and District Judge Bicks would not have to leave his Court for authority in support. District Judge Weinfeld of the same court in 1956 analogously held in the case of *Foltz v. Moore-McCormack Lines, Inc.*, 19 F. R. D. 301, that a motion must be granted because Congress gave the Rules the force and effect of a statute (cf. 28 U. S. C., sec. 2072). It necessarily follows that Judge Bicks could not give any consideration whatever to the affidavits of Arthur Kaiser because they are not pleadings under the Rules. See *Rank, et al. v. United States, supra*, and applicable rules; also, *Black v. Shondell, Coburn v. Coleman, Ginn v. Biddle, Acadian Production Corp. v. Land, Phillips v. Baker*, and *Van Sant v. American Express Co., supra.*

D. *Petitioner Should Not Be Subjected To Government By Men.*

Regardless of what District Judge Bicks thinks justice is, and in spite of what Circuit Judge Medina wants it to be, *justice is what the law says it is* and petitioner has a constitutional right to it even when his arguments are "technical". What the Court of Appeals has discarded as "technical arguments" are sound legal propositions which are fully supported by the Law of the Land.

The judgment sought to be reviewed could result in a coast-to-coast "shyster" — policy racket, if this Court should approve the illegal sanctioning of such "scrap of paper" treatment of life insurance contracts, destroying all confidence even in the legitimate life insurance companies. Does The Mutual Life Insurance Company of New York really believe that petitioner was paying premiums on his insurance contracts for such abuse? Incidentally, along the same line, such a preposterous belief would be no different from the unrealistic notion that your petitioner has been repeatedly making large disbursements for fees, printing, traveling and hotel expenses in connection herewith for summary denials of his rights, which denials do not even pretend to include a discussion of his points and a legal adjudication of them.

II. The Judgment Sought To Be Reviewed Has Deprived Petitioner Discriminatorily Of His Right to Due Process Of Law, Unlawfully Depriving Him Of His Right To Summary Judgment.

The Fifth Amendment to the Constitution of the United States guarantees petitioner that he shall not be

deprived of his property without due process of law. The judgment to be reviewed (App. 1) has deprived your petitioner of property rights including, but not limited to, the following: (A) the right to payment of the proceeds of the policies of insurance, with interest; (B) the right to litigate with due process of law to prevent the deprivation of said right; (C) the legal right to equal protection and application of the Federal Rules of Civil Procedure; and (D) the right to full consideration of the issues and legal points raised in his appeal, including the technical ones.

A. *Petitioner Has Been Deprived Of The Right To Full Use And Enjoyment Of The Proceeds.*

The wrongful acts of the respondent as above set forth have not only deprived petitioner of the proceeds of his policies of which he was the sole beneficiary, the absolute owner and the premium payer, but also of the income therefrom for over six years as well as the tremendous capital gains that would have accrued thereon.

B. *Petitioner Has Been Deprived Of His Right To A Day In Court.*

It is obvious that petitioner has not been allowed the right to be heard in advance of judgment, as contemplated by the Rules and applicable law, as well as by the Constitution. With due process of law, petitioner would have obtained summary judgment.

C. *Petitioner Was Denied Equal Protection Of The Federal Rules.*

It is well settled under the Rules that by its failure to plead or otherwise defend the action, the respondent

waived its right to do so, leaving the Court below no legal alternative but to enter summary judgment for plaintiff against defendant. Under the circumstances, the Court's refusal to apply Rule 56 was discriminatory.

When the matter came on to be heard in the District Court, all that was properly before Judge Bicks for consideration was plaintiff's undefended complaint and plaintiff's unopposed Note of Issue. It necessarily follows that there was no genuine issue as to any material fact, and Judge Bicks had no legal alternative but to grant plaintiff's Motion for Summary Judgment. *SMS Mfg. Co. v. U. S.-Mengel Plywoods, Inc.*, 219 F. 2d 606 (C. C. A. 10, 1955), held that if it affirmatively appears from the record that there is no genuine issue as to any material fact, the case is appropriate for disposition by summary judgment, and it becomes the duty of the Court to enter such judgment under Rule 56. Actually, there are so many authorities in support of the same point, the proposition should be considered elementary.

D. *Petitioner Was Denied Judicial Consideration And Review Of His Cause.*

The failure of the lower courts to have entered *legal* Opinions, manifesting consideration of all points and authorities submitted, subjects them to the exercise by petitioner of his right to criticize. That failure constituted violations of Canons of Judicial Ethics, there being a grave doubt about violations of Canon 1, Relations of the Judiciary; Canon 2, The Public Interest; Canon 3, Constitutional Obligations; Canon 5, Essential Conduct; Canon 6, Industry; Canon 14, Independence; Canon 19, Judicial Opinions; Canon 20, Influence of Decisions Upon

the Development of the Law; Canon 22, Review; and Canon, 34, Summary of Judicial Obligation.

The judges have a right to be wrong; but they have a concomitant duty to be sincere. Therefore, regardless of whether their conclusions are erroneous or legal, they must enter *legal* opinions as above set forth in order to keep their decisions above suspicion.

CONCLUSION

It is obvious from the foregoing that in the District Court your petitioner was subjected to a tyrannical Judge; and in the Court of Appeals he was discriminated against by a prejudiced Judge. Therefore, instead of this Honorable Court being the Court of last resort for your petitioner herein, it is actually the Court of only resort. Accordingly, in the exercise of its sound judicial discretion, this Honorable Court *a fortiori* should grant this petition for writ of certiorari.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 141—October Term, 1958.
(Argued January 15, 1959 Decided January 28, 1959.)
Docket No. 25312

PAUL GINSBURG, *Plaintiff-Appellant,*

—against—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant-Appellee.*

Before: MEDINA, LUMBARD and BURGER, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge.*

Paul Ginsburg appeals from an order of the District Court refusing to vacate a prior order denying his motion for summary judgment and declaring the action "enjoined" because an unvacated interpleader injunction of another Federal Court prohibited further procedural steps toward recovery. Opinion below not reported. Affirmed.

PAUL GINSBURG, *Pro se,* Pittsburgh, Pa.
CARL F. HOLLANDER, New York, N. Y. (Haughton Bell, New York, N. Y., on the brief), *for defendant-appellee.*

PER CURIAM:

Affirmed on the opinion of Judge Bicks, filed July 29, 1958.

25312

No. 902

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SUPREME COURT. U. S.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 25312

PAUL GINSBURG,

Plaintiff-Appellant,

—against—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant-Appellee.

APPELLANT'S [redacted] APPENDIX

PAUL GINSBURG
Appellant, Pro se
Carlton House
550 Grant Street
Pittsburgh 19, Pa.

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APPENDIX

Docket Entries

Date	*Proceedings*
May 11—53	Filed complaint & issued summons
May 15—53	Filed summons & return, served W. T. Johns, Secy & Treas 5-12-53
July 1—53	Filed affdvt of staying of action (Pending in WD of Pa.)
Sept. 21—53	Filed supplemental affdvt. re stay.
Apr. 12—56	On call of special pre-trial before Knox, J., —Hearing adjd to 10/8/56—
Oct. 8—56	On call of special pre-trial before Knox, J., Hearing adjd to 11/8/56—
Oct. 26—56	Special pre-trial Calendar before Knox, J. —Cancelled—
Jan. 21—57	On call for review—G. R. 21 before McGohey, J. Adj. 10/28/57
Oct. 28—57	On call for review—G. R. 21 before Edelstein, J.—Adjd to 12-4-57—
Dec. 6—57	Filed order—pltff shall file note of issue within 120 days, etc. or action may be dismissed—Bicks, J.—Mailed notice of entry 12-9-57.
Apr. 3—58	On call of calendar before Sugarman, J.—Application withdrawn.
Apr. 8—58	Filed Note of Issue & statement pursuant to Cal. Rule 5.—filed Note of issue pursuant to Judge Bick's order dated 12-6-57.

Docket Entries

—B—

Date	*Proceedings*
May 6—58	Filed pltff's affdvt & notice of motion for summary judgment—ret. 5-15-58.
May 8—58	Filed deft's affdvt of service by mail.
May 8—58	Filed affdvt & notice of cross-motion—Make order of USDC, WD Pa order of this court, etc.—ret. 5-15-58.
May 15—58	Memo endorsed on motion filed 5-6-58—Denied—See decision on cross-motion—Bicks, J.
May 15—58	Memo endorsed on cross-motion filed 5-8-58—Case herewith enjoined—See orders of USDC, WD of Pa & Phoenix, Ariz. (copies in file)—enter order on notice—Bicks, J.
June 27—58	Filed pltff's opposing affdvt to proposed order.
June 27—58	Filed pltff's supporting affdvt for summary judgment.
June 27—58	Filed pltff's unsigned counter-order.
June 27—58	Filed order & judgment—Pltff's motion for summary judgment denied; affdvts of A. Kaiser dated 7-1-53 & 9-18-53 constitute deft's answer; pltff permanently enjoined from prosecuting this or any other action etc.—Bicks, J.—Mailed notice of entry 6-30-58.
July 3—58	Filed copy of order filed 6-27-58 w/notice of entry.

Docket Entries

Date	*Proceedings*
July 8—58	Filed pltff's affdvt & notice of motion to vacate order of 6-27-58 and for summary judgment—ret. 7-14-58 before Bicks, J.
July 14—58	Filed pltff's Reply Affidavit.
July 25—58	Filed pltff's notice of appeal—Mailed copy to H. Bell 7-25-58.
July 25—58	Filed appeal bond—New Amsterdam Cas. Co.
July 29—58	Filed Opinion #24,510—Pltff's motions for reargument, etc. denied—So ordered—Bicks, J.—Mailed notice of entry 7-29-58.
July 29—58	Filed Opposing affdvt.

Complaint in Assumpsit

—1—

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 85-33

[SAME TITLE]

Paul Ginsburg, plaintiff, seeks to recover from defendant the sum of Thirty Thousand ($30,000.00) Dollars, with interest thereon, less credits properly chargeable against the said sum on the company books, upon the following cause of action.

1st. Jurisdiction in the within action is founded upon diversity of citizenship of the parties and an amount in issue in excess of Twenty-seven Thousand ($27,000.00) Dollars.

2nd. Plaintiff is a resident of the City of Pittsburgh, Allegheny County, Pennsylvania.

3rd. Defendant is a mutual life insurance company engaged in the sale of life insurance policies, inter alia, and has its principal office in the City of New York, New York County, State of New York, within the said judicial district.

4th. Plaintiff is the owner and beneficiary of two policies of life insurance issued by defendant upon the life of Samuel A. Ginsburg, now deceased. The said policies are numbered by defendant as 6149 400 and 6149 401, in an aggregate face amount of Thirty Thousand ($30,000.00)

Dollars. The said policies, together with application for payment thereon, are in the possession of defendant and are not presently available to plaintiff for the purposes of the within action, but they are by reference hereto made part hereof and in the course of the litigation shall be amended to the within complaint upon procurement thereof.

—2—

5th. Under the terms of the said policies, defendant agreed that in consideration of premiums acknowledgedly received by them, that they would pay to the beneficiary or owner of the said policies the aggregate sum of Thirty Thousand ($30,000.00) Dollars, less credits properly chargeable against the said face amounts for loans made thereon, and that the said payments would be made upon proof of death of the insured, to-wit: Samuel A. Ginsburg, now deceased.

6th. All of the terms and conditions of the said policies have been fully complied with by the said insured during his lifetime and by plaintiff. On the 7th day of April, 1953, Samuel A. Ginsburg, deceased insured, died at Phoenix, Arizona, and due and proper notice and proof of death was filed with defendant in accordance with the terms of the said policies.

7th. Although there is due and owing to plaintiff in excess of Twenty-seven Thousand ($27,000.00) Dollars upon the said policies, together with interest, and although plaintiff has made repeated demands upon defendant for payment of the said sums justly due and owing to plaintiff; nevertheless, defendant has refused or neglected and still refuses and neglects to make payment thereof to plaintiff.

WHEREFORE, plaintiff demands of defendant a sum in excess of Twenty-seven Thousand ($27,000.00) Dollars as

may be more specifically determined upon production by defendant of the said policies and its records in regard thereto before this Honorable Court upon hearing hereon.

A jury trial is hereby demanded.

PAUL GINSBURG
Plaintiff, pro se

(Duly verified.)

Order to File Note of Issue in 120 Days

The above entitled action having come on for review on the 4th day of Dec. 1957, before the Hon. Alexander Bicks, J., United States District Judge, and after hearing counsel, it is

ORDERED that the Plaintiff shall file a note of issue for trial, or take other action to obtain a determination of the above entitled action within 120 days from the date of this order, and it is further

ORDERED that if such action is not taken within the said period, the above entitled action may be dismissed without further notice, for want of prosecution, without costs.

Dated, New York, N. Y.
Dec. 4, 1957

ALEXANDER BICKS
United States District Judge.

Note of Issue

—16—

For Plaintiff	Paul Ginsburg, Pro se c/o Robert Hoppman Attorney at Law 477 Madison Avenue New York, N. Y. Tel. PLaza 1-1140
Attorney for Defendant	No appearance entered
Defendant	The Mutual Life Insurance Company of New York 1740 Broadway New York, N. Y. Tel. JUdson 6-4000 Ex. 410
Time Answer Received	No answer filed
Nature and Object of Action	For proceeds of life insurance policies
By whom Jury demanded ..	Plaintiff
Date of Such demand	May 11, 1953

Dated: New York, N. Y.
April 2, 1958

Plaintiff's Motion for Summary Judgment

—13—

Plaintiff, Paul Ginsburg, moves the Court, under Rule 56 of the federal Rules of Civil Procedure, to enter summary judgment for the plaintiff and against the defendant forthwith pursuant to the Complaint, on the ground that it is apparent and evident from the record and the supporting affidavit annexed hereto that there is no genuine issue as to any material fact herein and that plaintiff is entitled to judgment as a matter of law in the sum of $27,456.38, the principal amount sued for, together with interest thereon from April 7, 1953, at the rate of 6% and the costs and disbursements of this proceeding.

PAUL GINSBURG
Plaintiff, pro se
c/o Attorney Robert E. Hoppman
477 Madison Avenue
New York, New York

Dated: 5 May 1958

Defendant's Cross-Motion

—35—

SIR:

PLEASE TAKE NOTICE that upon all the proceedings heretofore had herein, and upon the affidavit of Carl F. Hollander, Esq., verified the 7th day of May, 1958, defendant will, upon the argument of the motion for a summary judgment made by plaintiff in this action and returnable on the 15th day of May, 1958, at 10:00 o'clock A. M., DST, in Room 506, United States Court House, Foley Square, New York City, New York, make a motion for an order:

1. Directing that the order of the United States District Court for the Western District of Pennsylvania, dated August 19, 1953, permanently enjoining and prohibiting plaintiff from further prosecuting the above entitled action be also made the order of this Court.

2. Directing the Clerk and Calendar Commissioner of this Court not to place the above entitled action on any Assignment Conference, Ready Day, or any other Trial Calendar until such time as it is shown that said order hereinabove referred to has been vacated or modified so as to permit said plaintiff to further prosecute this action.

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3. Granting such other, further and different relief as to the Court may seem just and proper.

Defendant's Cross-Motion

Dated: New York, May 7, 1958.

HAUGHTON BELL
Attorney for Defendant
Office and P. O. Address
1740 Broadway
New York 19, New York

To:

PAUL GINSBURG, Esq.
Plaintiff, pro se
c/o ROBERT E. HOPPMAN, Esq.
477 Madison Avenue
New York, New York

PAUL GINSBURG, Esq.
Plaintiff, pro se
Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

Order Entered June 27, 1958

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The following motions having been filed and brought on for hearing:

A. Plaintiff Paul Ginsburg's motion dated May 5, 1958 ~~for an order~~ pursuant to Rule 56 of the Rules of Federal Civil Procedure ~~for a motion~~ for a summary judgment.

B. Defendant The Mutual Life Insurance Company of New York s cross-motion for an order:

1. Directing that the order of the United States District Court for the Western District of Pennsylvania, dated August 19, 1953, permanently enjoining and prohibiting plaintiff from further prosecuting the above entitled action be also made the order of this Court.

2. Directing the Clerk and Calendar Commissioner of this Court not to place the above entitled action on any Assignment Conference, Ready Day, or any other Trial Calendar until such time as it is shown that said order hereinabove referred to has been vacated or modified so as to permit said plaintiff to further prosecute this action.

3. Granting such other, further and different relief as to the Court may seem just and proper.

Now on reading (1) the complaint herein, (2) the affidavits of Arthur Kaiser dated July 1, 1953 and September 18, 1953 submitted on behalf of defendant and on file in this Court, including the certified copy of an order permanently enjoining and prohibiting plaintiff Paul Ginsburg from prosecuting this action, said order being the

order entered by the United States District Court for the Western District of Pennsylvania in Civil Action No. 11521, an action instituted in said Court and subsequently transferred, pursuant to said Court's change of venue order, to the United States District Court for the District of Arizona, (3) the affidavit of Paul Ginsburg, dated May 5, 1958, in support of plaintiff Paul Ginsburg's motion for summary judgment, and (4) the affidavit of Carl F. Hollander dated May 7, 1958 in opposition to said motion and in support of defendant's cross-motion, and after hearing plaintiff Paul Ginsburg, appearing pro se in support of plaintiff's motion for a summary judgment and in opposition to defendant's cross-motion, and Haughton, Bell, attorney for said defendant, by Carl F. Hollander, of counsel, in opposition to plaintiff's motion for a summary judgment and in support of defendant's cross-motion, and due deliberation having been had thereon, it is

ORDERED

1. That plaintiff Paul Ginsburg's motion for a summary judgment be, and hereby is, denied.
2. ~~That defendant The Mutual Life Insurance Company of New York be regarded as not in default in this action.~~

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3. That the above mentioned affidavits of Arthur Kaiser dated July 1, 1953 and September 18, 1953 be regarded as constituting defendant's answer timely filed to the complaint herein setting forth as defendant's defense to said complaint the facts contained in said affidavits.

Order Entered June 27, 1958

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4. That plaintiff Paul Ginsburg be and hereby is permanently enjoined and prohibited ~~by this court~~ from prosecuting this action, or any other action for or on account of the amounts payable under or in any way connected with insurance policies #6149400 and 6149401 issued by the defendant other than the *action* in the U. S. Dist. Court for the Western Dist. of Pennsylvania (Civ. Ac. #115.21) ~~which said injunction and prohibition is in accordance with and in furtherance of the above mentioned order of the United States District Court for the Western District of Pennsylvania dated August 19, 1953.~~

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5. That this action be ~~designated and~~ marked as "enjoined" in this Court's files and records of this action ~~and that the Clerk and Calendar Commissioner of this Court be directed not to place this action on any Assignment Conference, Ready Day or any other Trial Calendar.~~

Dated: May ~~21st~~, 1958
June 27th

ALEXANDER BICKS
United States District Judge

Judgment Entered
June 27, 1958

HERBERT A. CHARLSON
Clerk

All changes have been initialed in the margin by AB.

No. 902 LIBRARY SUPREME COURT U. S.

FILED
MAY 8. 1959
JAMES R. BROWNING, Clerk

To be argued by
Paul Ginsburg of Pittsburgh

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 25312

PAUL GINSBURG, Plaintiff-Appellant,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant-Appellee.

MOTION TO REMAND

PAUL GINSBURG
Appellant, Pro se

Carlton House
550 Grant Street
Pittsburgh 19, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

MOTION TO REMAND

Paul Ginsburg, appellant, moves this Honorable Court to enter an Order,

Vacating its Order of February 19, 1959, denying his Petition for Rehearing;

Vacating its Order of January 28, 1959, affirming the decision of Judge Bicks below;

Then, upon reconsideration, remanding the cause with instructions to enter summary judgment for plaintiff-appellant and against defendant-appellee; and

In support hereof avers:

1. The Per Curiam Opinion of Circuit Judges Medina, Lumbard and Burger, which accompanied their denial of the Petition for Rehearing, contains three sentences. The first two sentences thereof fully justify this motion, while the third one simply explains why the Judges did not previously state "the reason" for their affirmance when they affirmed. Again, conspicuous by absence therefrom is any legal authority whatever for affirmance, which justifies appellant's contention that there is none.

2. They tacitly admit in the first sentence that there is no "valid outstanding injunction" *enforceable by them in New York* when they opine, "The basis for our affirmance is the existence of a valid outstanding injunction restraining the further prosecution of this case by appellant". Assuming *arguendo* that the supposed injunction is valid in Pennsylvania and/or Arizona, which it is not, nevertheless that in and of itself does not establish any basis for enforcement in New York. It is elementary that in order to enforce an injunction order of a foreign jurisdiction, there must first be ob-

tained a valid injunction order in this jurisdiction based thereon. It is a matter of record herein that this was not done.

As A Court Of Law, These Judges Never Heard Of The Injunction.

3. The record herein makes it manifest that the defendant-appellee admitted it has failed to plead the "injunction" pursuant to the Federal Rules of Civil Procedure and thus has waived its right, if any, to do so. **Furthermore, District Judge Bicks knew this or he would not have entered the Order (7a),** which he did, ordering the plaintiff to "file a note of issue for trial, or take other action to obtain a determination of the above entitled action within 120 days from the date of this order" and "if such action is not taken within the said period, the above entitled action may be dismissed without further notice, for want of prosecution, without costs". Does not the Order appealed from, as well as the affirmance thereof, conflict with said 120 day Order? It should be pointed out here that after service of the Note of Issue, no objection thereto was made by the defendant. As a matter of fact and of record, the defendant never even appeared in this action until after service of plaintiff's Motion for Summary Judgment, when it belatedly entered a "special appearance". **Is not this one matter of fact and of record itself sufficient to establish the point of plaintiff-appellant that the defendant-appellee never even attempted to obtain an injunction order here pursuant to the Federal Rules of Civil Procedure?** How else could the defendant have obtained a legal, enforceable injunction order except under the Rules? How can responsible Judges of a court of record get around this

point? Of course, they cannot get around it legally. They can do it only by setting a dangerous precedent, by giving favorable consideration to matters *de hors* the record just as if they were properly pleaded and proved. The honor of the fair administration of justice in the Federal System has already suffered too much. To add this insult to the already inflicted injury, would be disastrous.

Does This Court Always Refuse To Consider Technical Matters, Even When Supported By The Law Of The Land?

4. In the second sentence of said Per Curiam Opinion the Judges stated, "None of the technical arguments advanced by appellant furnish any ground for the disregard by us of this injunction". Here again we have simply the Judges' personal opinion. What this Court has brushed off as "technical arguments" are sound legal propositions which are fully supported by the Law of the Land. It is respectfully submitted that if they are good enough for the Supreme Court and Courts of Appeals for other circuits, this Court should certainly give them favorable consideration.

Is It True That The Gigantic Mutual Life Insurance Company Of New York Cannot Take Care Of Itself?

5. District Judge Bicks assumed the dual role of guardian and counsel for the defendant. The Judges of this Court should indeed be above such a departure. They should prove by their actions that appellant's constitutional guaranties will be lived up to by this Court

even though his contractual guaranties have not been lived up to by Mutual. Neither District Judge Bicks nor the appellee can sincerely deny that it is at least poetic justice that Mutual of New York should now find itself on the "technical" spot whence there is no lawful escape from its liabilities imposed by law. By granting the instant motion, this Honorable Court will uphold the law and block the temporary escape which Judge Bicks tried to donate to the defendant unlawfully. Incidentally, it is hoped that the consideration of this motion will not be influenced by the fact that a law partner of Harold R. Medina, Jr., Esquire, is on the Board of Trustees of The Mutual Life Insurance Company of New York. Said law partner is Roswell Magill, Esquire, of Cravath, Swaine & Moore.

Chip On The Shoulder.

6. If it be contended that the appellant has "a chip on his shoulder", that would not be denied. The "chip" is evidently justified and fully supported. This means that the Judges of this Honorable Court should try to support their affirmance, if they can, under the Rules and the applicable law, as well as to refute, if they can, the legal authorities already submitted by appellant in support of all of his points. If the Judges can and will do so, then your appellant will apologize profusely for having exercised his right to criticize and abandon this action. Otherwise, how can the Judges expect appellant to have confidence in the sincerity or legality of their decision?

The Supreme Court Will Grant Certiorari.

7. An important consideration governing the grant of certiorari by the Supreme Court arises where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. *Here we have both the departure and the sanctioning.* Furthermore, Mr. Justice Harlan, in advising lawyers on certiorari in a lecture delivered last month before the Association of the Bar of the City of New York, suggested that the surest way to get a petition for a writ of certorari granted is to show that the case turns on an issue of federal law as to which there is a conflict of decisions among the lower federal courts. *Here we have a conflict not only with other circuits as well as this one, but also with the Supreme Court.*

PAUL GINSBURG,
Counsel for Plaintiff-Appellant.

Dated: 24 February 1959.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 5 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 902.

PAUL GINSBURG,

Petitioner,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

HAUGHTON BELL,
Attorney for Respondent,
1740 Broadway,
New York 19, New York.

Of Counsel:
CARL F. HOLLANDER.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 902.

PAUL GINSBURG,

Petitioner,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1. May a party, who is expressly prohibited by an unvacated interpleader injunction of another Federal Court from prosecuting an action, take any procedural steps whatsoever in pursuit of the recovery sought in such action?

2. Does a change of venue destroy the legal effectiveness of an interpleader injunction order validly entered by a Federal Court which had jurisdiction of the parties and of the subject matter?

3. If a Federal Court learns of circumstances which would bar a party's right to prosecute or recover, does it have the discretionary power under the applicable statutes and rules to consider such circumstances regardless of the manner in which they are brought to the Court's attention?

Statutes and Rules of Federal Civil Procedure Involved.

The provisions of the statutes and Rules of Federal Civil Procedure upon which respondent relies are as follows: 28 U.S.C., Sections 1335, 1397, 2361 (interpleader statutes); 28 U.S.C., Section 1404(a) (change of venue); Rules 6(b) (enlargement of time), 8(d) (effect of failure to deny where responsive pleading is required), 12(b) (defenses to be asserted in answer if responsive pleading is required), 15(b) (amendments at trial), 55(c) (relief from default), 56(c) (summary judgment), 60(b) (errors and omissions). These provisions are set forth in the Appendix, except for Section 1404(a), which is set forth at page 7.

Statement of the Case.

This petition and the proceedings below involve petitioner's attempt to defy or circumvent a valid, existing, unvacated interpleader injunction which expressly prohibits him from prosecuting this or any other action (except the interpleader action itself) to recover interpleaded insurance policy proceeds.

The judgment of the Court of Appeals sought to be reviewed affirmed the order of the District Court below (S. D. N. Y.) denying petitioner's motion for recovery of the policy proceeds and granting respondent's motion for relief to bar further prosecution.

In claiming Supreme Court jurisdiction for alleged departures from proper judicial procedure and deprivation of constitutional rights, petitioner resurrects matters already adjudicated in earlier litigation, misinterprets the applicable substantive and procedural law and makes many unsubstantiated statements and charges. However,

respondent respectfully submits that an examination as to what has actually transpired in this litigation will furnish clear refutation of these claims.

The opinion of District Court Judge Bicks below (R. 24a-27a; 170 F. Supp. 212), adopted by the Court of Appeals (R. 28a-29a; 263 F. 2d 608), ably summarizes what he correctly terms as "multifarious proceedings" involving Paul Ginsburg and The Mutual Life Insurance Company of New York as parties in connection with the controversy as to the proceeds of life insurance policies 6149,400 and 6149,401 on the life of petitioner's brother Samuel Ginsburg, deceased.

In 1953, following the assertion of conflicting claims on behalf of petitioner in this action, and others in an Arizona action, respondent, in accordance with the remedy of Federal interpleader provided by Sections 1335, 1397 and 2361, Title 28, U. S. C.,[1] duly paid the insurance proceeds into Court, obtained its discharge and the injunction order mentioned above (R. 22a-23a).

Thus, as shown in the affidavits dated July 1, 1953 and September 18, 1953 of Arthur Kaiser, one of respondent's legal officers, who is an attorney-at-law associated with the office of the attorney for the respondent, petitioner has been enjoined and prohibited from further prosecuting this action ever since 1953 (R. 17a-23a).

These affidavits were filed with the District Court below for the purpose of showing the entry of temporary and permanent interpleader injunction orders by the United States District Court for the Western District of Pennsylvania in Civil Action No. 11521.

The first of these affidavits, filed July 1, 1953, referred to the temporary interpleader injunction order restraining

[1] Text of these provisions of statutes set forth in Appendix, pp. 1a-2a.

petitioner from prosecuting this and other actions (R. 17a-20a).

The second affidavit, filed September 18, 1953, included as an attached exhibit a certified copy of the permanent interpleader injunction order (R. 21a-23a). This order permanently enjoined and prohibited petitioner from further prosecuting this and other actions (R. 22a-23a).

This injunction order is still in full force and effect. It furnishes the basis for respondent's opposition to the relief asked for by petitioner as a part of a continuing series of acts in defiance of the injunction and as an attempted collateral attack upon it.

In reliance upon the interpleader injunction prohibiting petitioner's prosecution of this action, respondent did not answer or otherwise proceed in the action herein, except for filing the affidavits referred to above.

Pursuant to a change of venue order granted by the United States District Court for the Western District of Pennsylvania, the interpleader proceeding in which the conflicting claims of petitioner and others are to be adjudicated was transferred to the United States District Court for the District of Arizona.

Petitioner's prior attacks on the validity of this change of venue were fully and extensively litigated (125 F. Supp. 920, and 131 F. Supp. 950 (D.C., W.D. Pa.), app. dis. 228 F. 2d 881 (CA 3), cert. den. 351 U.S. 979, rehearings den. 352 U.S. 813, 355 U.S. 875, and later application den. 150 F. Supp. 344 (D.C., W.D. Pa.)).

This appeal and other proceedings in which petitioner seeks recovery in this action are in clear violation of the injunction order. They constitute an impermissible collateral attack upon it. If any attack is to be made upon the interpleader injunction, or if petitioner has any claim to the proceeds of the policies, such attack or claim must be

asserted in the interpleader action which is still pending in Arizona—not in this action.

Respondent respectfully submits that the Courts below correctly concluded that, in view of the injunction, summary judgment should be denied and further prosecution barred.

I.

Petitioner, who is under the express disability of an injunction order forbidding the prosecution of this action, is not legally entitled to proceed in any manner toward recovery.

Petitioner in his involved statement of reasons as to why he feels the interpleader injunction order is not binding on him at this time, does not, and cannot, deny that such order was entered against him. Indeed, the record contains his express admissions of its entry against him and of his prior obedience to it.[2]

Petitioner now seeks to avoid the effect of the injunction by saying that it was improperly granted (a point which cannot be considered collaterally in this action) and that it has somehow become ineffective by the change of venue of the interpleader action (an unfounded claim which is disposed of in Point II).

---

[2] "Although the defendant did not proceed herein pursuant to the federal Rules of Civil Procedure, it did lodge with the Clerk of this Court a copy of an Order entered in the District Court for the Western District of Pennsylvania restraining your plaintiff herein from prosecuting this action, which Order has long since its entry become ineffective and unenforceable; * * *". (Pages 1 and 2, petitioner's affidavit of May 5, 1958 in support of motion for summary judgment, R. 20-21.)

"It is a matter of record that the said injunctive decree has always been legally objectionable; that, nevertheless, as long as it was subsisting, the plaintiff herein obeyed it, without Order of this Court; and that he did not prosecute this action until the said decree became void." (Part of Para. 5, petitioner's affidavit of May 19, 1958 in opposition to proposed order, R. 44.)

As correctly stated by Judge Bicks below in his opinion (R. 27a; 170 F. Supp. 212, at p. 214), petitioner offers only his "conclusory allegations" in support of his position.

In view of the incontestable existence of the unvacated injunction, the avenue of recovery recently sought by petitioner is clearly barred. Manifestly, he cannot now be permitted to utilize his own wrongful action in attempting to prosecute the action in contravention of a valid Court order as the foundation for any right to obtain relief against respondent in the action, whether based on "default" or on any other alleged grounds. In other words, petitioner is barred from the relief he asks herein by the fundamental principle that a party cannot be permitted to take advantage of his own wrong. (*Stearns Co.* v. *United States*, 291 U. S. 54, 61-62 (1934); *Deitrick* v. *Greaney*, 309 U. S. 190, 196, rehearing den., 309 U. S. 697 (1940); *Glus* v. *Brooklyn Eastern District Terminal*, U. S. , 79 S. Ct. 760 (April 20, 1959).)

The principle that a person may be barred from relief by his own wrongful conduct is so fundamental that Courts have repeatedly held that it need not even be pleaded because it constitutes a matter impelling the Court to intervene on its own motion to prevent the wrongdoer from profiting from his wrong rather than a matter of defense. (*Gynex Corporation* v. *Dilex Institute of F. Hygiene*, 85 F. 2d 103 (CCA 2, 1936); *Renaud Sales Co., Inc.* v. *Davis*, 104 F. 2d 683 (CCA 1, 1939); *Frank Adam Electric Co.* v. *Westinghouse Electric & Mfg. Co.*, 146 F. 2d 165 (CCA 8, 1945); *Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814 (CCA 2, 1946), cert. den. 328 U. S. 859 (1946).)

The continued existence of the interpleader injunction order clearly bars this or any other procedural steps petitioner may attempt to take toward recovery in this action.

II.

A change of venue does not destroy the effectiveness of an interpleader injunction order or any other orders entered in an action prior to the change of venue.

Petitioner's claim is that the change of venue and other collateral proceedings somehow affected the validity of the judgment. This claim is clearly unfounded.

The change of venue was to the United States District Court in Arizona, which is the state of residence of the other persons claiming the proceeds of the policies involved. This was pursuant to Section 28 U. S. C. 1404(a), which provides that:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Recent and clear judicial confirmation of the fact that prior orders in other proceedings are not affected by a change of venue is furnished by *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955), and *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (CA 2, 1950).

In *Norwood* v. *Kirkpatrick*, *supra*, this Court said (p. 31):

> "And Judge Parker of the Fourth Circuit, consultant to the Advisory Committee, writing for the court in *Jiffy Lubricator Co., Inc.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362, also construed the statute as we understand it:
>
> '. . . A dismissal in application of [*forum non conveniens*] or any other principle puts an

end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes. * * *,"

In *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, *supra*, cited by Judge Bicks below, the Court, in construing the same provision, said (p. 868) that "when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done."

In view of the prior change of venue, the Pennsylvania District Court's decision of February 13, 1958 (R. 31) to the effect that that Court no longer had jurisdiction does not support petitioner's position. The validity of the interpleader injunction order was not affected by the change of venue, but became, in effect, the order of the Arizona District Court. As District Judge Gourley pointed out, "any relief to which movant might be entitled must be pursued in the United States District Court at Phoenix, Arizona." See also, Judge Bicks' statement to the same effect in his opinion below (R. 26a; 170 F. Supp. 212, at p. 214).

The change of venue involves only a change in the place of trial of the conflicting claims. All orders heretofore entered in that action, including the interpleader injunction order, remain in full force and effect.

III.

Where a Federal Court learns of circumstances which would bar the other party's right of prosecution or recovery, it has the discretionary power to consider such circumstances regardless of the manner in which they are brought to its attention.

Since petitioner's motion for a summary judgment was clearly predicated upon petitioner's default theory, the District Court below certainly had the power to declare that respondent should not be regarded as having been in default under the circumstances and to deny the motion for summary judgment because of the existence of the injunction. This conclusion is clearly correct and valid both upon the fundamental principle that petitioner cannot be permitted to take advantage of his own wrong in violating a Court order and upon the equally fundamental discretionary powers the Courts have in any event under the Federal Rules.

Petitioner, in asserting respondent has waived its right to rely on the injunction, is under a gross misconception as to the nature and effect of the Federal Rules as applied to this situation.

FIRSTLY, as shown in Point I, he cannot be permitted to utilize his own wrong. This is a subject upon which a Court can act upon its own motion whether or not any such defense has been raised.

SECONDLY, the provisions of the Rules of Federal Civil Procedure upon which petitioner relies are applicable only to situations in which a responsive pleading is "required". See Rules 8(d) and 12(b).[3] Such pleading certainly is not

[3] Text of these provisions of Rules set forth in Appendix, p. 3a.

required if the other party is under the express disability of a Federal interpleader injunction order prohibiting him from proceeding in any other action. Any other conclusion would defeat the effectiveness of the interpleader remedy by requiring useless procedural steps by the interpleading plaintiff in every action in which one of the conflicting claims has been asserted against it.[4]

THIRDLY, the claim that a party should not, or cannot, be permitted to proceed in a case due to the pendency of other related proceedings is not a matter of defense of the type referred to in these rules. It has been repeatedly held that a motion to stay an action pending the determination of another action between the same parties, or for other reasons, is not a defense of the type which is waived under the Federal Rules if not pleaded.

Butler v. *Judge of United States District Court, etc.*, 116 F. 2d 1013 (CCA 9, 1941);
Moore v. *Dunham*, 240 F. 2d 198, 200 (CA 10, 1956);
Green v. *Cravatt*, 35 F. Supp. 491 (D. C., W. D. Pa., 1940);
Parker v. *Transcontinental & Western Air, Inc.*, 8 F. R. Serv. 12e. 231, Case 16, p. 169, 4 F. R. D. 325 (U. S. D. C., W. D. Mo., 1944).

FOURTHLY, a Federal Court has broad powers under the Federal Rules, particularly Rule 6(b) (enlargement of time), Rule 15(b) (amendments at trial), Rule 55(c) (relief from default), Rule 56(c) (summary judgment) and Rule 60(b) (errors and omissions),[5] to determine whether or not the pleadings or any other facts before the Court warrant the entry of a default, summary, or any other form

---

[4] See Interpleader Statutes cited at pp. 1a-2a.

[5] Text of these provisions of Rules set forth in Appendix, pp. 2a-5a.

of judgment against a party based on the claim that he is in default for failure to answer or that he has waived a particular defense by not pleading it.

The breadth of the discretionary power of a Federal Court to permit the assertion of meritorious defenses at any stage of the proceedings without regard to whether such defenses were originally pleaded is well illustrated by the decisions under these rules.

Accordingly, in *Rossiter* v. *Vogel,* 134 F. 2d 908, 912 (CCA 2, 1943), the Court reversed the District Court's grant of summary judgment on the ground that non-pleaded defenses had been waived, saying that "where facts appear in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment."

In *United States ex rel. Laughlin* v. *Eicher,* 56 F. Supp. 972 (U. S. D. C., D. C., 1944) it was held that an affidavit in support of the defendant's motion for a summary judgment could be considered in place of an answer or a formal answer could be filed at any time, even after judgment.

In *Tillman* v. *National City Bank of New York,* 118 F. 2d 631 (CCA 2, 1941), the Court sanctioned amendment at the trial stage so as to permit the assertion of a meritorious affirmative defense not pleaded in the answer, where no surprise was claimed. Indeed, amendments permitting the addition of defenses have been permitted even after final judgment. See: *Federal Deposit Ins. Corporation* v. *Siraco,* 174 F. 2d 360, 363 (CA 2, 1949), and cases cited in that opinion; *Berrios* v. *Baetjer,* 6 F. R. Serv. 60b.24, Case 1, p. 665 (U. S. D. C. Puerto Rico, 1942).

Moreover, respondent respectfully submits that the considerations supporting respondent's right to rely on the interpleader injunction order are far stronger than were involved in the cases discussed above. As contrasted with

the situation involved in many of these decisions, this is not a case in which respondent has suddenly and belatedly asserted a contention as to which petitioner had no knowledge.

For a period of almost 5 years, during which a certified copy of the injunction prohibiting petitioner from prosecuting this action has been on file with the District Court below with petitioner's knowledge, petitioner never, until very recently, challenged the procedural regularity of the manner in which respondent sought to protect its rights. Until his recent maneuvers, petitioner at no time asserted either that he had a right to seek judgment in the action or that respondent was in any way in "default" as to the manner in which such injunction was brought to the attention of the District Court below.

Under the circumstances, petitioner cannot possibly claim surprise or prejudice. Indeed, both here and in the Courts below he has set forth strenuously and at some length his arguments as to why he thinks the injunction is not now binding upon him.

In view of the circumstances clearly showing the continued existence and validity of the interpleader injunction order, the Courts below correctly denied summary judgment and granted the relief sought by respondent to free it from further and unwarranted harassment by petitioner.

Conclusion.

The interpleader injunction order is, and at all times since its entry has been, binding upon petitioner so as to prevent him from taking this or any other steps toward recovery in this action. The validity of the interpleader injunction order has not been affected by the change of venue of the action in which it was entered and any Federal

Court has the power to recognize its existence and effect at any stage of the action regardless of the manner in which it is brought to the Court's attention.

Respondent feels that it has been indulgent in merely resisting petitioner's repeated and persistent actions in violation of the injunction order rather than seeking special relief in the interpleader action, now pending in the Arizona District Court, on the basis of its claim that petitioner has violated the interpleader injunction order. However, respondent does not wish to have its indulgence misconstrued as an admission that it has no right to such relief for petitioner's actions.

In any event, since it is clear that petitioner's attempted proceedings toward recovery in this action are in violation of a Court order prohibiting such prosecution, and that the proceedings and the conclusions of the Courts below were correct and in accordance with due process and proper judicial procedure, certiorari should be denied.

Respectfully submitted,

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CARL F. HOLLANDER,
Of Counsel.

June, 1959.

Appendix.

Interpleader Statutes Upon Which Respondent Relies.

28 U. S. C., Sec. 1335:

"*Interpleader*

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

28 U. S. C. Sec. 1397:

"*Interpleader*

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

28 U. S. C. Sec. 2361:

"*Process and procedure*

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

Provisions of Federal Rules of Civil Procedure Upon Which Respondent Relies.

Rule 6(b):

"*Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expira-

tion of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

Rule 8(d) (pleadings—failure to deny):

"*Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Rule 12(b) (presenting defenses and objections):

"*How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, * * *."

Rule 15(b):

"*Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be

amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Rule 55(c):

"*Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Rule 56(c) (motion and proceedings on summary judgment):

"*Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 60(b) (relief from judgment for mistakes, etc.):

"*Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence

could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., §1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 902

PAUL GINSBURG, Petitioner

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

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v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Respondent.

PETITIONER'S REPLY BRIEF

The respondent's brief in opposition fails to comply (and could not) with paragraph 1 of Rule 24 because it does not disclose "any matter or ground why the cause should not be reviewed by this Court".

The three **Questions Presented** (p. 1) on behalf of the respondent fail to present a single question that is properly before this Honorable Court.

The **"Statutes and Rules of Federal Civil Procedure Involved"** (p. 2) upon which the respondent relies, are not at all involved herein and have no applicability whatever to the Questions Presented (Petition, p. 2).

The respondent's **Statement of the Case** (pp. 2-5) is a gross misrepresentation of the case. It simply contains one paragraph (p. 4) which is outstanding for its pertinence: "In reliance upon the interpleader injunction prohibiting petitioner's prosecution of this action, **respondent did not answer or otherwise proceed in the action herein, except for filing the affidavits referred to above**" (emphasis supplied).

The respondent's frank admission that in the District Court it did not answer or otherwise proceed in the action except for filing affidavits, points to the crux of the case below. This is an admission of respondent's incurable default, which in turn poses the real question below: Did not the respondent thus waive its right, if any, to plead the "injunction"; and was not District Judge Bicks powerless, under the law, to give that affirmative defense to the respondent?

Assuming *arguendo* that your petitioner *was* enjoined in Pennsylvania and *is* enjoined in Arizona, it is a matter of record herein that he never was and *now* cannot be enjoined in New York.

Respondent's argument **I** (pp. 5-6) erroneously presupposes petitioner's "express disability of an injunction order" which, even if true, is not in issue here, because regardless of the alleged injunction's existence, validity or enforceability, the plain admitted point is that respondent did not plead or otherwise defend the action under the Federal Rules of Civil Procedure, pursuant to which Rules summary judgment must be entered as a matter of law for petitioner against respondent.

Respondent's argument **II** (pp. 7-8) is another immaterial one, with no place in this review. Just as respondent's first argument reinforced petitioner's point that the interpleader was illegal for lack of adverse claims against the respondent; its second argument supports petitioner's point that the transfer of the cause under 1404(a) from Pennsylvania to Arizona was illegal for inapplicability of 1404(a) to *in rem* proceedings.

Respondent's argument **III** (pp. 9-12) manifests the workings of respondent's defense mechanism. It

shows "Firstly", the respondent does not know the difference between right and wrong; "Secondly", it does not know the Rules; "Thirdly", it does not know one defense from another; "Fourthly", it thinks and hopes "a Federal Court has broad powers under the Federal Rules", but does not know how legally powerless a Court can be under the Rules applicable herein, without the right of waiver. Respondent's citations do not support its propositions, and its propositions do not support denial of certiorari herein.

Does not the straining and stretching of respondent's arguing merely reveal how hard it is trying to convince itself that it is not a crooked, contract breaker that, like a clever slicker, will treat "suckers" politely and gentlemanly while the payment of premiums continues, after which it will capriciously and whimsically entertain a reckless disregard for its contractual obligations and petitioner's contractual rights.

The respondent by now must be coming to a realization that one should never start something without considering what the end might be.

More than six years have passed since your petitioner surrendered his contracts to respondent for payment, and he has not yet been paid in money, but only in abuse at great expense. Those scraps of paper which were signed and sealed by The Mutual Life Insurance Company of New York provided that your petitioner was not only the sole beneficiary but also the absolute owner thereof and premium payer. How then, under such circumstances, could the respondent legally justify any of its misconduct since April 7, 1953? How then could the

respondent justify anything but prompt payment to petitioner?

No wonder the respondent ignores the Federal Rules of Civil Procedure and does not consider itself bound by them. It similarly ignores its contracts and does not consider itself bound by them. No wonder then that it is all mixed up in its brief on who is wrong, not knowing the difference between right and wrong.

Respondent's **Conclusion** is that it merely has been illegally resisting petitioner's repeated attempts to compel it to honor its contracts with him "rather than seeking special relief in the interpleader action, now pending in the Arizona District Court". This representation to the Court, is nothing but a ruse. It would not dare appear as a party in the interpleader action, for fear of permitting petitioner the forum for redress of his grievances against it. However, the respondent's Phoenix Counsel has always been present at proceedings in Arizona and keeps a close watch on them, the better to influence the proceedings adversely to petitioner. As a matter of fact, more than six years ago when respondent encouraged the "adverse" claimant to bring suit in Phoenix based upon an obviously unprovable, trumped up oral trust, petitioner advised respondent to present a valid Motion to Dismiss it, in line with its contractual duty to him. Upon refusal, your petitioner offered to pay respondent's counsel fees and received another refusal. The action would readily have been dismissed as to respondent just as it has been dismissed as to your petitioner. But this respondent does not seem to know any more about good faith than it does about good law. Nevertheless, since the respondent now claims

that it can get "special relief" in Arizona, should not this Honorable Court enter an adjudication which would leave it to seek special relief in that forum, by reversing the extra special relief already donated to it by District Judge Bicks with the approval of Circuit Judge Medina?

Conspicuous by absence from respondent's brief is any denial whatever that Circuit Judge Medina's son, Harold R. Medina, Jr., Esquire, and his law firm (Cravath, Swaine & Moore) work for the respondent, The Mutual Life Insurance Company of New York; or that retired Circuit Judge Harold R. Medina was specially ready, able and available to approve District Judge Alexander Bicks' illegal donation to respondent.

ADDENDA

On May 18, 1959 (just three weeks ago), the opinions of this Honorable Court were entered at No. 58 October Term, 1958, in the case of *Dick, Petitioner, v. New York Life Insurance Co.*, which opinions chart the certiorari course. Mr. Chief Justice Warren delivered the opinion of the Court, and Mr. Justice Frankfurter the dissenting opinion. For purposes herein, it does not matter which opinion is the correct one in that case, because both opinions support petitioner's right to certiorari in this case.

The authorities cited in Mr. Justice Frankfurter's dissent, the Evarts Act and the "Judges' Bill", will be cited in support of certiorari herein. *In the first place,* the importance of this case to the litigants is incidental and subordinate to the importance to the public, because there is involved the right to due process of law, de-

prived through a judgment that conflicts with the law of the instant and other Circuits, as well as the law of this Honorable Court. Therefore, pursuant to the Evarts Act, certiorari should be granted herein through sound judicial discretion "to secure uniformity of decision". It is respectfully submitted that when the certiorari power should be exercised to secure uniformity of decision, as in the instant case, it should not be denied because the case is incidentally important to the litigants. *In the second place,* the "Judges' Bill" supports certiorari herein because after Mr. Chief Justice Taft testified that no litigant is entitled to more than two chances, he went on to say the Supreme Court's function "is to preserve uniformity of decision among the intermediate courts of appeal". What better opportunity could be afforded this Court than the one in this case to preserve uniformity of decision, by deciding that the Fededal Rules of Civil Procedure must be followed by all litigants alike, just as they are for the protection of all litigants alike?

Incidentally, the Petition has already dealt with the two "chances" this petitioner has had, concluding that his first "chance" was before a tyrannical District Court and his second "chance" was before a prejudiced Circuit Court, with the obvious result that this Honorable Court is not a Court of last resort to him, but a Court of first chance.

This Honorable Court is invited to make a simple test of the reliability of the Court of Appeals by comparing its Opinion (App. 1) with the Record, to see if the case and its issues can be recognized therefrom; then to compare its judgment (App. 1) with the issues, to see if there has ever been an adjudication of a single issue

properly before the Court. (It will be noted that the entire opinion and judgment, including caption, names of Judges and Counsel, *et cetera,* were easily printed on one page with room to spare). Such an examination is the most effective way in which this Court can ascertain that your petitioner never had a chance.

CONCLUSION

The files of this Honorable Court are loaded with petitions for certiorari directed to all Ten Circuits in which Circuit Judges have deliberately, whimsically, capriciously denied litigants their right to a second chance. The cases which your petitioner alone has brought into this Court from the instant and other Circuits, particularly the Third and Seventh, establish this. Therefore, this Court's supervisory power must have been intended as a substitute second chance. However, the Court's reluctance to exercise its supervisory power, and the great odds against granting certiorari have made Circuit Judges, so inclined, quite confident that they can repeatedly dispense "justice" as they please, denying litigants a real second chance, *without fear of review.* In order to restrict, if not eliminate this disregard of the honor of the fair administration of justice in the Federal system, the petition for writ of certiorari should be granted in this case.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

25312

No. 902

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To be argued by
Paul Ginsburg of Pittsburgh

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 25312

PAUL GINSBURG, Plaintiff-Appellant,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant-Appellee.

PETITION FOR REHEARING

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STATES COURT OF APPEALS
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PETITION FOR REHEARING

To the Honorable, the Chief Judge and the Judges of said Court:

The petition for rehearing of Paul Ginsburg, appellant, respectfully represents:

1. On January 15, 1959, this appeal was argued before: Medina, Lumbard and Burger, Circuit Judges. At the outset, Judge Medina, presiding, persuaded counsel to shorten the time for arguments unduly by assurance that the Judges had already read the briefs.

2. On January 28, 1959, this Court's decision was rendered, from which it is obvious that the Court misapprehended the entire appeal. The said decision in full is as follows:

> "Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*.
>
> "Paul Ginsburg appeals from an order of the District Court refusing to vacate a prior order denying his motion for summary judgment and declaring the action "enjoined" because an unvacated interpleader injunction of another Federal Court prohibited further procedural steps toward recovery. Opinion below not reported. Affirmed.
>
> "Per Curiam: Affirmed on the opinion of Judge Bicks, filed July 29, 1958."

3. It is a matter of record to the contrary, apparent from Appellant's Brief (p. 5), that this appeal is actually from District Judge Bicks' Order dated June 27, 1958, which was not accompanied by an Opinion, whereby plaintiff's tenable and legally supported Motion for Summary Judgment was erroneously denied and defendant's untimely, insupportable "Counter-motion" to have the action marked "enjoined" was granted. Fur-

thermore, the Notice of Appeal was filed on July 25. 1958, prior to Judge Bicks' Order refusing the motion to vacate his Order which was appealed from, and hence Judge Bicks' said second order dated July 29, 1958, which was accompanied by an opinion, could not be the subject of an appeal (Appellant's Brief, p. 6) for two reasons. In the first place, an appeal lies only from the lower court's adjudication, not from its refusal to reconsider. In the second place, since Judge Bicks' second order and its accompanying opinion were filed erroneously after the Notice of Appeal (as well as after the expiration of the time for filing the Notice of Appeal) they are not properly a part of the Record on this appeal. Therefore, there is no procedural or substantive basis for this Court's affirmance "on the opinion of Judge Bicks, filed July 29, 1958". As a result, the only accurate one of the few sentences in this Court's decision is, "Opinion below not reported", and necessarily so.

The Appellant Has, In Effect, Been Deprived Of His Right Of Appeal.

4. This Honorable Court overlooked or misapprehended every one of appellant's Points, all of which are fully supported under the Federal Rules of Civil Procedure and the applicable law (Appellant's Brief, pp. 7-13), having been submitted as follows:

> "1. An affirmative defense which is not pleaded pursuant to Rule 8(c) is waived pursuant to Rule 12(h). Therefore, the defendant waived its right to claim injunctive relief below, assuming but not admitting that it had such a right. Furthermore, the affidavits of Arthur Kaiser are not and cannot be considered as pleadings under the Rules, rendering them void of consideration.

"2. District Court Judges are bound by the Federal Rules of Civil Procedure as by an Act of Congress, and they are powerless to waive the Rules. Therefore, Judge Bicks was powerless (1) to consider and regard the affidavits of Arthur Kaiser as constituting defendant's answer timely filed setting forth the facts contained therein as a defense to the complaint, because said untimely affidavits are not pleadings and the 'facts' contained therein would simply constitute an affirmative defense assuming but not admitting them to be true and properly pleaded; (2) to order plaintiff permanently enjoined and prohibited from prosecuting this action, because there was no record basis for such an order; and (3) to order this action marked 'enjoined.'

"3. Under the Federal Rules of Civil Procedure and the applicable law, Judge Bicks had no alternative but to enter summary judgment for the plaintiff and against the defendant.

"4. The Court of Appeals, in the exercise of its supervisory control over District Judge Bicks, should vacate his Order entered June 27, 1958, and remand the cause with directions to enter summary judgment for the plaintiff against the defendant."

Appellant's Reply Brief Was Ignored.

5. Appellant's Reply Brief shows how professionally obnoxious is the appellee's Brief from every point of view, and that it is wholly without merit.

Affirmance Could Result in a Policy Racket.

6. The plaintiff-appellant not only is the sole beneficiary named in the policies of insurance on the life of his brother, but also is the absolute owner of those contracts of insurance. If such "scrap of paper" treatment (Reply Brief, p. 2) is sanctioned for life insurance con-

tracts, then a lucrative coast-to-coast policy-"shyster" racket could obviously result, destroying all confidence even in the legitimate life insurance companies. Does the Mutual Life Insurance Company of New York really believe that your appellant was paying premiums on the insurance contracts for such abuse? Incidentally, along the same line, such a preposterous thought would be no different from the unrealistic notion that your appellant has been repeatedly making large disbursements for fees, printing, traveling and hotel expenses in connection herewith for summary denials of his rights, which do not even pretend to include a discussion of his points and a legal adjudication of them.

Litigants Should Not Be Subjected to Government By Men.

7. Regardless of District Judge Bicks' personal opinions and views of the justice in a court action pending before him, he must dispense justice under the law. No matter how strongly District Judge Bicks may feel about his personal opinions, or how contrarily to the Rules and law, justice is what the law says it is and United States Judges are bound thereby. In the instant case, District Judge Bicks ignored the dictates of the Rules and the mandates of the Law, and substituted therefor his personal "rules and laws" which he cannot do lawfully in America. That is not "The American Way." It is the totalitarian way, un-American and foreign. Should this Honorable Court have given sanction to that, as it did?

Judge Bicks Should Not Have Donated a Defense to the Defendant.

8. Since nothing of record indicates that those representing The Mutual Life Insurance Company of New York are in need of protection by guardian because of mental or physical incompetence, minority or senility, or any other reason, District Judge Bicks was indiscreet to grant the defendant *nunc pro tunc* a non-existent (or even legal) defense not pleaded and therefore waived, to "protect" the defendant from its liabilities imposed by law. That is precisely the sort of action that calls for an exercise of supervisory control by the Court of Appeals to insure proper judicial administration in the Federal System, according to the Supreme Court (Appellant's Brief, p. 13). **A fastidious regard for the honor of the fair administration of justice requires that the Court of Appeals refuse to sanction such a departure from the usual and accepted course of judicial proceedings;** otherwise, the Supreme Court under Section 1(b) of its Rule 19 will grant *certiorari*.

Appellant Deserves Due Process of Law.

9. When presiding Judge Medina stated at the opening of the "argument" before this Honorable Court that he thought the plaintiff-appellant was bound by an injunction in another Circuit and was obliged to try to get out of it in this Circuit, your appellant while denying that to be in issue felt like the political prisoner in an Iron Curtain Country who was told by the Dictator that he would receive a fair trial, be convicted and hanged. Your appellant's feeling has been justified in the Court's decision which covers less than half a page, contains no

legal authority, and fails to disclose what the issues before the Court really are. Any experienced practitioner could see between the few lines of the decision that the main issues of the appeal must have been swept under the rug on the courtroom floor.

The Judge and His Oath.

10. "The Judge And His God" is the title of a "sermon" delivered by Hon. Harold R. Medina before the Church Club of New York City on February 5, 1951, because he thought it was time that "the impact of religion" upon Judges was discussed (reported in the Pittsburgh Legal Journal, Vol. 99, 1951, No. 12, pp. 6-7). This laudable thought of Judge Medina is highly commendable. Numerous experiences over the years with bad court decisions have caused your appellant to advocate that same thought, because of the apparent absence of God when Court decisions are rendered by some Judges. The impact of religion is essential to equal justice under the law, because when a litigant is judged by a Judge and his God, he shall be judged by a Judge and his Oath. From such judgment, no appeal.

Back to Church.

11. Judge Medina declared that he has gone to Church to pray "for divine guidance and for strength to do his duty" from "the one source that never fails". Your appellant failed to observe any such humility during the course of his oral argument. Experience has proved that petitions for rehearing are not granted, because human Judges without God (and without Oath) stubbornly and incessantly refuse to concede that they overlooked or misapprehended anything or that such fail-

ings are even possible. As a right, rehearing is merely illusory; as a remedy, it is positively atrophic. But not so in this case, because here we at last are before a Judge and his God and his Oath. The Honorable Harold R. Medina will, during consideration of this petition for rehearing, go back to St. James' Church and pray,—not, it is hoped, for your appellant as he says that he has done for other litigants, but for "divine guidance and for strength to do his duty". Thereupon justice will be done,—not as District Judge Ricks thinks it ought to be done, but as the Law dictates. Your appellant humbly thanks The Lord that he presently is before a Judge and his God.

Let the Master, Not His Servants, Pull the Next Strings.

12. "After all is said and done, it is not we who pull the strings; we are not the masters, but the servants of our Master's will, and it is well that we should know it to be so", said Judge Medina. Let it not be said by Judge Medina or anybody else learned in the law, that the strings previously pulled herein were pulled by our Master or by His servants. They were obviously pulled by "Judges" without Him. Yet it was natural for them to err, and your appellant forgives them for they knew not what they do. "To err is human, and to forgive is divine". However, with the approaching realization of what is required, your appellant's Judges will do justice and act humbly under the Law. They will merely be the servants of our Master's will, and they shall not interfere when our Master pulls the strings.

Wherefore, your appellant *prays* that this Honorable Court will grant this petition for rehearing.

PAUL GINSBURG,
Appellant-Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PAUL GINSBURG,
Counsel for Appellant.

9 February, 1959.